***United States Court of Appeals***

***for the Second Circuit***


# APPELLANT'S BRIEF & APPENDIX

74-2270



IN THE

B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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No. 74-2270

---

UNITED STATES OF AMERICA, Appellee

v.

PHILIP J. McCANN, Appellant

---

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF VERMONT



---

BRIEF AND APPENDIX OF APPELLANT

---

John P. Maley
Attorney for Appellant
192 College Street
Burlington, Vermont 05401

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960(b)(2), Title 21, United States Code. He was also charged in Count II of that indictment that he unlawfully, knowingly and willfully possessed with intent to distribute and dispense approximately 168 grams of cocaine, a Schedule II controlled substance, in violation of Sections 841(a)(1) and 841(b)(1)(B), Title 21, United States Code. The Appellant was also charged in Count III of the indictment that he unlawfully, willfully, knowingly and fraudulently did import into the United States merchandise contrary to law, to wit, approximately 168 grams of cocaine, a Schedule II controlled substance, in violation of Section 545, Title 18, United States Code.

Trial by jury was had before the Hon. Albert W. Coffrin, U.S. District Judge, sitting in Burlington, Vermont on June 6 - 7, 1974. At the conclusion of the evidence, the Government elected not to proceed on Count III of the indictment and it was dismissed. The jury returned a verdict of guilty on Counts I and II.

At the close of the evidence, respondent moved for judgment of acquittal on the grounds that there was insufficient evidence upon which the jury could

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FOR THE DISTRICT OF VERMONT

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# BRIEF OF APPELLANT

---

## STATEMENT OF THE CASE

The Appellant was charged by way of indictment that he unlawfully, knowingly and willfully did import into the United States from a place outside, approximately 168 grams of cocaine, a Schedule II controlled substance, in violation of Sections 812, 952, 960(a)(1) and

base a verdict of guilty and that motion was denied. Subsequent to the verdict, defendant filed a Motion for Judgment of Acquittal and to set aside the verdict on Count II on the grounds that there was insufficient evidence on which the jury could find that the defendant possessed a regulated substance with intent to distribute or dispense same. That motion was denied, and Appellant filed his Notice of Appeal.

## STATEMENT OF THE FACTS

On the night of January 25, 1974, Appellant was a passenger on a bus which was traveling from Montreal, Canada across the United States border at Highgate Springs, Vermont, en route to Burlington, Vermont. At the border, during routine questioning, customs agent James Fuller found that Appellant had a visa on his passport indicating that he had recently traveled to Bogota, Columbia (Tr. 28). Following his discussions with the Appellant, Mr. Fuller found hidden behind a partition in the bathroom at the rear of the bus approximately 5 ounces of cocaine contained in a plastic bag. (Tr. 30).

Appellant's personal belongings were searched and it was discovered that a piece of paper contained in his wallet appeared to be similar to a piece of paper found with the cocaine. (Tr. 32). A forensic chemist, Joseph E. Cole, testified over the objection of defense counsel, that in his opinion the paper found in Appellant's wallet and the paper found with the cocaine, could have originated from a common source. (Tr. 134).

While in custody, Appellant was questioned as to his knowledge or ownership of the cocaine and Mr. McCann stated that he wanted to make no statement or comment concerning the cocaine. (App. 30). After this statement by Appellant, drug agent, James Glazner, then proceeded to go into general questioning of Appellant as to his travels and work history.

Prior to the commencement of the evidence, a hearing was held on the voluntariness of these statements made by Appellant during the interrogation of agent Glazner on the night of the incident. This hearing was held following the indication by defense counsel that he would object to efforts by the government to introduce at trial those statements

elicited from Appellant about his travels and work history.

At the hearing on the voluntariness of the statements made by Appellant, agent Glazner admitted that he continued to interrogate Appellant after Appellant had said he didn't want to discuss the cocaine matter. (App. 30, 31). Agent Glazner also testified that this information he was seeking could be helpful in his investigation regarding the cocaine. (App 40).

The Court ruled that the statements by Appellant regarding his earnings and travels were voluntary and that they would be allowed in evidence. (App. 45). During the course of the trial those statements which were made by Appellant regarding his travels and work history, were introduced in evidence through the testimony of agent Glazner. (Tr. pp. 52-53).

At the request of Appellant's counsel, the Court charged the lesser included offense of knowing or intentionally possessing a controlled substance. During the course of their deliberations, the jury asked the Court if it could advise as to what the 5.5 ounces of cocaine was worth in American dollars and how long it would take a normal person to use that amount of cocaine. (App. 65 ). The Court, in response

to those questions, further charged the jury that there was no evidence in the case regarding those questions and that they could only use the evidence in the case which was available to base their determination. (App. 65).

## ARGUMENT

A. THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL AND TO SET ASIDE THE VERDICT ON COUNT II OF THE INDICTMENT ON THE GROUNDS THAT THERE WAS INSUFFICIENT EVIDENCE FROM WHICH THE JURY COULD FIND DEFENDANT POSSESSED A REGULATED SUBSTANCE WITH INTENT TO DISTRIBUTE OR DISPENSE SAME.

The criteria to be used in reviewing this matter is that the evidence, both direct and circumstantial, together with reasonable inferences to be drawn therefrom, is sufficient if, when taken in the light most favorable to the government, the fact finder may find the defendant guilty beyond a reasonable doubt. To be sufficient, the evidence must be substantial, that is, it must do more than raise a mere suspicion of guilt. A conviction cannot be based upon evidence which is consistent with both innocence and guilt. U.S. v. Ortiz 445 F. 2d 1100, 1103 (10th Cir. 1971).

It is incumbent upon the trial court to grant a Motion for Judgment of Acquittal when the evidence, viewed in the light most favorable to the government, is insufficient to sustain a conviction. Rule 29(a) Federal Rules of Criminal Procedure; Cephus v. U.S., 324 F. 2d 893, 895 (District of Columbia Cir. 1963).

The third element of Count II that the jury had to find beyond a reasonable doubt was that Appellant possessed the drug with intent to distribute same. That element requires that the jury find beyond a reasonable doubt that the possession was with the intent to give, sell or otherwise transmit to others and not for one's own personal use. (App. 57). It is with respect to this element of Count II that Appellant submits there was insufficient evidence to find Appellant guilty beyond a reasonable doubt.

Appellant makes this contention conceding at the outset the proof of possession of a substantial amount of a controlled substance may support the inference that the possessor intended to distribute the drugs rather than retain them for personal use. U.S. v. Mather, 465 F. 2d 1035, 1938 (5th Cir. 1972).

In the Mather case, the case most commonly cited for the proposition that circumstantial evidence is sufficient to establish guilt of possession with intent to distribute, in that trial without jury the amount of cocaine was stipulated to be 197.75 grams. There was no independent proof that defendant used, or did not use, cocaine personally and no evidence as to what a normal individual's use would be. It is important to note, however, that the Court judicially noticed in Mather, that the value of the drugs possessed was $2500 and the Court further found that the drugs were one hundred percent pure and uncut. In the case at hand, there was no evidence as to Appellant's use, or non-use, of cocaine, nor was there testimony as to the approximate value of the drugs. There was further no testimony that the grams possessed were one hundred percent pure.

It is clear that the tests set up in Mather, and since followed, was whether the amount and value (emphasis added) of the drug may support an inference of intent to distribute as distinguished from mere possession for personal use. In the cases since Mather and using the test applied therein, there has

been evidence as to the street value of the drugs, and also evidence in some as to prior drug dealings by the defendant, or some other independent evidence which would give greater strength to the inference that the goods were held for other than personal use. U.S. v. Blake 480 F. 2d 50, 58 (8th Cir. 1973) (Street Value of Goods); U.S. v. Wilkerson, 478 F. 2d 813 (8th Cir. 1973) (testimony as to resale value of drugs); U.S. v. Finstad, 478 F. 2d 840 (5th Cir. 1973) (statement by informer of other sale); U.S. v. Echols, 477 F. 2d 37, (8th Cir. 1973) (value of cocaine). U.S. v. Ledesma, 499 Fed. 35, 43 (9th Cir. 1974). (Value of Drugs).

In the case before this court, there was no independent evidence as to the value of the cocaine possessed, nor was there any indication respondent was involved in the sale of this or any other drugs. The jury was left to speculate as to respondent's intent and this speculation was clearly demonstrated by their questions propounded to the Court during deliberations. The jury inquired what the worth in American dollars was of the 5.5 ounces of cocaine and they further asked just how long it would take a normal person to use this amount of cocaine. (App. 65).

The jury is obviously asking the Court for help on the deliberation on Count II of the indictments and specifically the third element of the Count. They are saying that they want to know what the value of the goods are and how long it would take a normal person to use that amount because they as laymen simply do not know the answer and without it, they are left to speculate. Because there was no evidence offered on these two points, the Court had no alternative but to instruct them that they would have to decide on the evidence that they had before them. It thus becomes clear that the best they could do in this regard was speculate as to whether or not the defendant was in possession of the drugs with the intent to distribute, because they had no expertise or knowledge as to how much 5.5 ounces of cocaine represents here from the point of view of dollar value or use.

The burden of proof is on the government to prove every element necessary for conviction, including that element of intent to distribute the drugs. U.S. v. Clark, 475 F. 2d 240, 249 (2nd Cir. 1973). The government has attempted to meet that burden of proof on the possession with intent to distribute element, by

circumstantial evidence. That being the case, that evidence, and reasonable emphasis to be drawn therefrom, must not only be consistent with guilt, but inconsistent with innocence. U.S. v. Wages, 458 F. 2d 1270, 1271 (6th Cir. 1972). While those inferences from facts which have been established by circumstantial evidence may be sufficient to sustain a verdict of guilt, mere suspicion or speculation cannot be the basis for creation of logical inference. U.S. v. Thomas, 453 F. 2d 141, 143 (9th Cir. 1971).

The rule to be applied with respect to inferences is that laid down in Turner v. U.S., 1970, 396 U.S. 398, 90 S. Ct. 642, 24 L. ed. 2d 610, 617 and referred to and applied in Mather at Page 1038:

> "The inference is invalid unless it can at least be said with substantial assurance that the presumed fact (here intent to distribute) is more likely than not to flow from the proved fact on which it is made to depend."

Here, the government at trial evidently attempted to use the proved fact that Appellant had traveled to Bogota, Columbia on two occasions and that there were calculations in a book on his possession, as facts that the jury could infer that he intended to distribute cocaine. Appellant submits that these circumstances

did not suffice to meet the government's burden and more was needed before there could be found "substantial assurance" that the fact of intent to distribute followed. This becomes more obvious when we are made aware that the jury was looking for more circumstances and facts when they asked the Court during deliberations for the value of the drugs and how long it would take an individual to use same. It is clear that without that information, they are left to speculate.

B. THE TRIAL COURT ERRED IN ITS FINDING THAT CERTAIN STATEMENTS MADE BY APPELLANT WHILE IN CUSTODY WERE VOLUNTARY.

Incriminating statements obtained during interrogation of a suspect are inadmissible unless the government can show that the Appellant's constitutional right to remain silent has been waived voluntarily. Miranda v. Arizona, 384 U.S. 436, 16 Lawyer's Ed. 2d 694, 86 S. Ct. 1602. There is no dispute in this matter that Appellant was in custody when certain statements were made by him regarding his earnings and travels over the two years or so previous to his arrest.

It is clear from a reading of the pre-trial hearing on the issue of the voluntariness of certain statements

made by Appellant, that upon being advised of his constitutional right to remain silent, he immediately took the position that he wanted to make no statement concerning the cocaine matter. (App. 30 ). To state it another way, the accused did not want to give any statements that would incriminate him with regard to the cocaine that was found on the bus.

It is equally clear that the Drug Enforcement agent, James Glazner, during his interrogation of the Appellant, desired to find out what the suspect had been doing during his recent past, both with respect to his travels and his means of earning income. (App. 32 ). Agent Glazner wanted to obtain this information so it would aid him in his investigation of the cocaine discovery. The natural affect of obtaining these statements from Mr. McCann was that they were to be used against him at trial.

The criteria in determining whether or not incriminating statements made by a suspect during interrogation should be admitted at trial was referred to in United States v. Montos, 421 F. 2d 215, 222 (5th Cir. 1970);

> "At trial the prosecution must show that the defendant was given the Miranda warnings before

custodial interrogation began, that he had the opportunity to exercise the rights to which he was so advised throughout the interrogation, that he knowingly, intelligently waived these rights and agreed to answer questions or make a statement; otherwise, use against him of evidence obtained as a result of "custodial" interrogation is in error."

The record is clear that Appellant wanted to make no statement that had to do with agent Glazner's investigation of the cocaine. At the pre-trial hearing on the voluntariness issue, the following testimony elicited from Glazner in cross examination by Appellant's counsel is material:

"Q.: Mr. McCann gave the impression he didn't want to talk with you any further?

A.: He made the statement he wanted to make no comment concerning cocaine.

Q.: With respect to other things, you entered into a general conversation with Mr. McCann, did you not, about his travels and his life?

A.: Yes, I did. (App. 30 )."

Further into the cross examination, it is again pointed out that agent Glazner continued to interrogate the suspect in an effort to elicit incriminating statements from him after the representation was made by the suspect that he did not want to talk about the cocaine matter.

"Q.: So, at some point after he said he didn't want to discuss the cocaine you were investigating, you went on from that point and continued to interrogate him, didn't you?

"A.: I had conversation with him, yes. (App. 33-34).

Agent Glazner's efforts to obtain incriminating statements from the Appellant are further pointed out in the following testimony:

"Q.: Mr. Glazner, the purpose of your conversation with Philip over this whole period of time was to obtain information from him, isn't that true?

A.: What kind of information, sir?

Q.: Any kind of information about his background.

A.: I was trying to get information concerning his activities for the past two years, yes, sir.

Q.: And, the reason you wanted that information was because you thought this would be helpful in your investigation, isn't that true?

A.: Possibility, it could have been, yes, sir. (App. 39, 40).

Appellant submits that the questions should have stopped with respect to anything that would have to do with the cocaine matter as soon as the Appellant made the statement that he did not want to discuss it. As the Court indicated, Appellant, "made it abundantly clear" (App. 42) that he didn't want to discuss the cocaine matter. The questioning should have stopped at this point with regard to anything that had to do with that particular investigation. Yet it continued, under the guise that the information sought had nothing to do with the cocaine matter, but was rather an effort to obtain general background information regarding the Appellant. It is obvious from the reading of Glazner's testimony at both the pre-trial hearing and again during the course of the trial that his goal was to obtain statements from Appellant that would be incriminating to him and would eventually be used against him at trial.

The admissibility of the statements by the accused Drug Enforcement agent Glazner at the time of his

interrogation hinge solely on whether the accused effectively waived his constitutional right to remain silent. In this regard, the government has a heavy burden to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination. If in fact the accused misunderstood the legal effect of his speaking to the interrogating officer generally about his background, it can't be said his waiver was voluntary. This burden becomes greater in this case as the statements were elicited from McCann at a time when he was being held in a room by himself. He was "in custodial surroundings" prior to having been brought before a U.S. magistrate for arraignment. As stated in Miranda, "even though not involuntary in traditional terms, a confession (incriminating statements here) is considered involuntary where it is obtained by law enforcement officer by way of incommunicado interrogation, in an environment created for no purpose other than to subjugate the individual to the will of his examiner." Miranda, See 16 Lawyer's Edition, 2d at page 720-722.

Appellant was not brought before a U.S. magistrate pursuant to Rule 5(a) of the Federal Rules of Criminal Procedure until the following afternoon and did not

have the assistance of counsel until that time. By that time, the incriminating statements had already been made. It has been repeatedly asserted that the purpose of Rule 5(a) is to prevent pre-arraignment detention of an arrested person for the purpose of securing a confession to have such person fully advised of his right by a judicial, instead of an enforcement officer. U.S. v. Chadwick, 415 F. 2d 167, 169 (10th Cir. 1969). The record is bare as to whether the trial court considered the delay in arraignment and the lack of assistance of counsel at the time the statements were made, in making his ruling on voluntariness, but there are certainly factors that should have been considered. See 18 United States Code Section 3501.

The admission in evidence of statements by Appellant as to his travels and means of livelihood were obviously prejudicial to him. The gave the government the opportunity to argue that the Appellant was a young man who was traveling throughout the world without any apparent means of income and that those circumstances should be considered by the jury as to whether or not Appellant possessed the drugs with intent to sell or distribute same.

## CONCLUSION

For the reasons stated above, Appellant's conviction should be reversed and judgment of acquittal should be entered.

Respectfully submitted,

John P. Maley
Attorney for the Appellant

APPENDIX.

UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF VERMONT

---

No. 74-2270

---

UNITED STATES OF AMERICA

vs.

PHILIP J. McCANN

---

DOCKET ENTRIES

CRIMINAL DOCKET
UNITED STATES DISTRICT COURT Cr. 74-19 COFFRIN

D. C. Form No. 100 Rev.

| TITLE OF CASE | ATTORNEYS |
|---|---|
| THE UNITED STATES | *For U. S.:* |
| vs. | U. S. Attorney |
| PHILIP McCANN | |
| | *For Defendant:* John Maley, Esq. (Apt) 192 College St. Burlington, VT |

| STATISTICAL RECORD | COSTS | | DATE | NAME OR RECEIPT NO. | REC. | DISB. |
|---|---|---|---|---|---|---|
| J.S. 2 mailed MAR 5 1974 | Clerk | | 1974 2-3-3-1 | #22384 e.o.ft | 5 00 | 5 00 |
| J.S. 3 mailed OCT 4 1974 | Marshal | | | | | |
| Violation | Docket fee | | | | | |
| Title 21 & 18 | | | | | | |
| Sec. 812, 841(a)(1), 841 (b)(1)(B), 952(a), 960(a)(1), 960(b)(2) and 545 | | | | | | |

| DATE | PROCEEDINGS | |
|---|---|---|
| 1974 Jan. 28 | Filed Magistrate's Complaint. | 1. |
| " " | Filed Order Specifying Methods and Conditions of Release. | 2. |
| " " | Filed Appointment of John Maley, Esq. for Defendant. | 3. |
| " " | Filed Temporary Commitment. | 4. |
| Feb. 1 | In Court Probable Cause hearing held before Magistrate James Flett. Wm. Gray, Esq. for Gov't.; John Maley, Esq. for Deft. | |
| " " | Statements made to Court by Mr. Gray. | |
| " " | The following witnesses, sworn by Clerk, were examined for Government: James B. Fuller, George Burttram and James V. Glazener. | |
| " " | At 4:10 P.M., Gov't. rests. Defendant rests. Evidence closed. | |
| " " | Magistrate finds that there is probable cause to incarcerate Mr. McCann. | |
| " 6 | Filed Magistrate's Final Commitment returned served. | 5. |
| " 7 | Filed Defendant's Motion for Reduction of Bail. | 6. |
| " 11 | Filed Appearance Bond for Deft. in the amount of $10,000.00 -- Deft. not to depart the District of Vermont and the Providence of Quebec, Canada. | 7. |
| " 13 | Filed Record of Grand Jurors Concurring. | |

| DATE 1974 | PROCEEDINGS | |
|---|---|---|
| Feb. 13 | Filed Indictment in violation of Sections 812,841(a)(1), 841(b)(1)(B); 952(a), 960(a)(1), 960(b)(2), Title 21; Section 545, Title 18, United States Code. | 8. |
| Mar. 4 | In open Court before Judge Coffrin, defendant in Court with his attorney, John Maley, Esq., for arraignment. David Reed, Esq. for Government. | |
| " " | Court makes inquiries of Defendant prior to plea. | |
| " " | Defendant waives reading of Indictment and enters a plea of not guilty as to Counts I, II & III of Indictment. | |
| " " | Ordered: that bail remain as previously fixed. | |
| Apr. 29 | Filed Deft's. Motion for Discovery and Inspection. | 9. |
| " " | " Deft's. Motion that Federal Magistrate make available recording of the hearing on preliminary examination. | 10. |
| " " | " Deft's Motion to Suppress Evidence and Return Property to Deft. | 11. |
| " " | " Deft's. Motion to Dismiss Indictment. | 12. |
| " " | " Waiver of Deft's. Presence. | 13. |
| May 3 | " Government's Opposition to Motions to Dismiss the Indictment, to Suppress Evidence and Return Property to Deft.; Response to Motion that Recording of hearing on preliminary examination be made available; Response to Motion for Discovery and Inspection. | 14. |
| May 9 | " Deft's Motion to Continue Hearing on Deft's Motion to Dismiss Indictment and Deft's Motion to Suppress Evidence and Return Property. | 15. |
| " " | " Memorandum in support of Motion for Discovery and Inspection. | 16. |
| May 13 | In open Court before Judge Coffrin, hearing on defendant's motion for discovery and inspection. David Reed, Esq. for Government; John Maley, Esq. for defendant. | |
| " " | Statements made to the Court by Mr. Maley and by Mr. Reed. | |
| " " | Ordered: Motion overruled. | |
| " " | Hearing on motion that Federal Magistrate make available recording of the hearing on preliminary examination. | |
| " " | Ordered: Motion granted. | |
| " " | Hearing on motion to suppress evidence and return property to defendant and motion to dismiss Indictment continued -- defendant to file memorandum within one week; Government has one week thereafter to file reply memorandum. | |
| " 20 | Filed Memorandum in support of Defendant's Motions to Supress evidence and Dismiss the Indictments. | 17. |
| " 23 | " Government's Response to Deft's Motion to suppress evidence and dismiss the Indictments. | 18. |
| June 4 | In open Court before Judge Coffrin, trial by jury begun. William Gray, Esq. and David Reed, Esq. for Government; John Maley, Esq. for Defendant. | |
| " " | A jury was impaneled by the Clerk. | |
| " " | Ordered: that an alternate jury be impaneled. | |
| " 6 | Filed Subpoena(Gov't.) to testify returned served. | 19. |
| " 6 | In open Court, trial resumed. | |
| " " | Upon consideration of defendant's motion to dismiss Indictment, it is | |
| " " | Ordered: Motion overruled. | |
| " " | Mr. Maley states that defendant's motion to suppress evidence on constitutional grounds is withdrawn. | |

| DATE 1974 | PROCEEDINGS |
|---|---|
| June 6 | Jury excused -- hearing re admissibility of certain testimony in presence of jury. |
| " " | James V. Glazener, sworn by Clerk, was examined for Government. |
| " " | Court makes inquiries of Mr. Glazener. |
| " " | Court finds that certain statements made by defendant were made voluntarily. |
| " " | Jury present, the oath to Petit Jurors in criminal cases was administered to the jury. |
| " " | Opening statements were made to the jury by Mr. Reed. |
| " " | Mr. Maley reserves his opening statements at this time. |
| " " | The following witnesses, sworn by Clerk, were examined for Government: James B. Fuller, James V. Glazener, George H. Burttram, Joseph E. Koles, Robert Reynard and Theresa Reynard. |
| " " | At 4:15 PM, Government rests. |
| " " | Jury excused -- Mr. Maley moves for a judgment of acquittal on behalf of the defendant. |
| " " | Ordered: Motion denied. |
| " 6 | Filed Government's requests to charge. 20. |
| " " | In Chambers, attorneys present, Mr. Reed moves that Count III of Indictment be dismissed. |
| " " | Ordered: Motion granted. Count III is dismissed. |
| " " | In open Court, at 9:30 AM, defendant rests. Government rests. Evidence closed. |
| " " | Opening arguments were made to the jury by Mr. Reed, followed by Mr. Maley. |
| " " | Closing arguments were made to the jury by Mr. Reed. |
| " " | Ordered: that Richard Sawyer be appointed as Foreman of the jury. |
| " " | At 10:30 AM, Court commences the charge to the jury, concluding at 10:50 AM, at which time the jury retires to deliberate the case. |
| " " | Ordered: that alternate juror be excused at this time. |
| " " | (Ordered: that the Marshal provide meal for the jury and officers in charge) |
| " " | At 2:10 PM the jury come into Court for further instructions, after receiving same, they again retire to further deliberate the case. |
| " " | At 2:45 PM, the jury come into Court and report a verdict of guilty as to Cts. I & II of Indictment. |
| " " | Ordered: that presentence investigation be made. |
| " " | Mr. Reed moves that defendant be remanded to custody of the U. S. Marshal pending sentence. |
| " " | Ordered: that defendant be remanded to custody of the U. S. Marshal. |
| " 10 | Filed Defendant's request to charge. 21. |
| " 14 | Filed Defendant's Motion for Judgment of Acquittal and to Set Aside the Verdict. 22. |
| " 24 | In Court before Judge Coffrin. David Reed, Ass't. U.S.Atty for Govt. John Maley, Esq. for Deft. Deft. not present. |
| " " | Statements made to Court by Mr. Maley in support of his motion followed by Mr. Reed. |
| " " | ORDERED: Motion denied. |
| " " | Hearing on defendant's motion for judgment of acquittal and to set aside the verdict. |
| " 26 | Filed Assignment of Portion of Bail Funds. 23. |

| DATE 1974 | PROCEEDINGS Defendant's | |
|---|---|---|
| July 3 | Filed/Notice of Appeal. Mailed copy to U. S. Atty., John Maley, Esq., Judge Coffrin and Clerk Fusaro and Court Reporter. | 24. |
| Aug. 2 | Mailed record on appeal to Clerk, U. S. Court of Appeals for the Second Circuit, New York, N. Y. Attys. notified. | |
| Sept. 16 | In open Court before Judge Coffrin, defendant present with his attorney, John P. Maley, Esq., for sentence. Jerome O'Neill, Esq. for Government. | |
| " " | Statements made to Court by Mr. Maley and Mr. John McCann(father). | |
| " " | Statements made by Mr. O'Neill. | |
| " " | Filed Judgment and Probation/Commitment Order -- defendant found to be a Young Adult Offender under Title 18, U.S.C., Section 4209 under the Youth Corrections Act; defendant is sentenced pursuant to Title 18, U.S.C., Section 5010(b) to the custody of the Attorney General for treatment and suprevision until discharged by the Division. Defendant to received credit for time spent incarcerated. | 25. |
| " " | Court advises defendant of his right to appeal. | |
| " 24 | Filed defendant's Notice of Appeal. Mailed copy to U. S. Attorney, John Maley, Esq., Judge Coffrin, Court Reporter and Clerk, U. S. Court of Appeals for the Second Circuit. | 26. |
| " 26 | " Authorization & Voucher for Expert or Other Services. | 27. |
| Oct. 10 | " Judgment and Probation/Commitment Order returned served -- Deft. delivered on 9-16-74 to Franklin County Jail, St. Albans, Vt.; Deft. delivered on 10-8-74 to Federal Retention Headquarters, New York, N. Y. | 28. |
| Nov. 1 | Mailed record on appeal to Clerk, U.S. Court of Appeals, Second Circuit. Attorneys notified. | |
| Dec. 16 | Filed Transcript of Trial held on 6-4-74 and 6-6,7-74. | 29. |
| " " | Mailed Supplemental Record on Appeal to Clerk, U. S. Court of Appeals for the Second Circuit. Attys. notified. | |

Indictment.

UNITED STATES DISTRICT COURT

DISTRICT OF VERMONT

| | | |
|---|---|---|
| UNITED STATES OF AMERICA | ) | Sections 812, 841(a)(1) |
| | ) | 841(b)(1)(B), 952(a), 960(a) |
| v. | ) | (1), 960(b)(2), Title 21; |
| | ) | Section 545, Title 18, |
| PHILIP McCANN | ) | United States Code |

COUNT I

The Grand Jury charges:

On or about the 25th day of January, 1974, in the Judicial District of Vermont, PHILIP McCANN, the defendant, unlawfully, knowingly and willfully did import into the United States from a place outside thereof approximately 168 grams of cocaine, a Schedule II controlled substance; in violation of Sections 812, 952, 960(a)(1) and 960(b)(2), Title 21, United States Code.

COUNT II

The Grand Jury further charges:

On or about the 25th day of January, 1974, in the Judicial District of Vermont, PHILIP McCANN, the

defendant, unlawfully, knowingly and willfully did possess with intent to distribute and dispense approximately 168 grams of cocaine, a Schedule II controlled substance; in violation of Sections 841(a)(1) and 841(b)(1)(B), Title 21, United States Code.

COUNT III

The Grand Jury further charges:

On or about the 25th day of January, 1974, in the Judicial District of Vermont, PHILIP McCANN, the defendant, unlawfully, willfully, knowingly and fraudulently did import into the United States merchandise contrary to law, to wit, approximately 168 grams of cocaine, a Schedule II controlled substance; in violation of Section 545, Title 18, United States Code.

A true bill.

ANN L. BARR
Foreman.

George W.F. Cook

United States Attorney

By: Jerome F. O'Neill
Assistant U.S. Attorney

EXCERPTS OF TRANSCRIPT OF TESTIMONY

Preliminary Hearing On Voluntariness of Statements Made By Appellant.

THE COURT. If the Government is going to offer any statement made by your client, we will expect the Government to advise the Court, and we will have a hearing on voluntariness and whether or not your client waived his rights.

MR. MALEY. We might have to object, your Honor.

MR. REED. If that objection is voiced, we should have one, your Honor, because there will be statements made by Mr. McCann to Mr. Glazner of the Drug Enforcement Administration.

THE COURT. When you get to that, we'll excuse the Jury and have a hearing as far as that is concerned. Is there anything else? As I understand it, it will be reserved and you will make your appropriate objections at the time it may be sought to be introduced by the Government?

MR. MALEY. Correct, your Honor.

MR. REED. Mr. Glazner will be the first or second witness--I haven't decided yet. I would like to be

able to use, to use some of what was stated in my opening. Can we have the hearing now?

THE COURT. Is he here?

MR. REED. Yes.

(The witness entered the courtroom)

JAMES V. GLAZNER, Sworn

DIRECT EXAMINATION

MR. REED. If it agreeable to Mr. Maley, I will proceed by way of direct examination.

THE COURT. That is the customary manner in which to do it.

Q. (By Mr. Reed) Mr. Glazner, I will direct your attention to the evening of January 25, 1974 and ask you if you had occasion to investigate a cocaine matter at the border of Highgate Springs and speak with the suspect, Mr. Philip McCann?

A. Yes, I did.

Q. You were called there by Mr. Fuller, I believe?

A. Jim Fuller, Custom Inspector, yes.

Q. Upon arriving and talking with Mr. McCann, did you request if he was advised of his rights?

a. Yes.

Q. What did he reply?

A. He was fully informed of his rights by Custom Inspector Fuller and said he understood them, when I tried to read them this second time.

Q. Did you advise him of his rights again before you spoke with him?

A. Yes, I did.

Q. During the time you spoke to him, isn't it true that you gave him two periods of close to a half hour apiece to be alone to collect his thoughts and then voluntarily speak with you after that time period?

A. Yes, sir, I did, upon his request. I gave him that time.

MR. REED. Thank you.

CROSS EXAMINATION

Q. (By Mr. Maley) Mr. Glazner, you had some conversation with Philip after you arrived at the border, did you not?

A. Not until I took him upstairs and advised him of his rights.

Q. As I understand it, the time you advised him of his rights, you started to talk to him, didn't you, to interrogate Mr. McCann, did you not?

A. No, sir, I did not interrogate him. I advised him of his rights and told him I didn't want him to make any statement, not to say one thing. I wanted to talk with him for a couple minutes, which I did.

Q. So to answer the question, you talked to him after you advised him of his rights?

A. Yes.

Q. At some point, Mr. McCann said he didn't wish to speak with you any more, didn't he?

A. The second time I went up to Philip to give him an opportunity to get his head together, I gave him a phone book to call his attorney, if he wanted to, and he advised he didn't want to talk to an attorney.

Q. Mr. McCann gave the impression he didn't want to talk with you any further?

A. He made the statement he wanted to make no comment concerning cocaine.

Q. With respect to other things, you entered into a general conversation with Mr. McCann, did you not, about his travels and his life?

A. Yes, I did.

Q. This was after the time that Mr. McCann advised you he didn't want to make any statement with respect to the cocaine matter, isn't that correct?

A. I believe it was after he said he didn't want to make statements about the cocaine. I asked if he wanted to talk with me concerning his background, and he said, yes, he would. I told him he didn't have to if he didn't want to, but he voluntarily gave me this information.

Q. So you entered into a general conversation about what Philip had been doing, where he had been traveling, and so forth?

A. Correct.

Q. And, this conversation continued on and after until the time Mr. McCann arrived the following day to be arraigned before the magistrate?

A. No, I don't recall that I talked with him at Highgate, and there was no conversation between the time we left Highgate until he was placed in the rehabilitation center.

Q. You met him in federal court?

A. Yes, talked with him before the United States magistrate.

Q. And, you had general conversation with him again, did you not?

A. I don't recall.

Q. Isn't it fair to say, Mr. Glazner, that from the time you advised Mr. McCann of his rights, from that point on he gave you no indication he wanted to discuss with you the cocaine matter, isn't that true?

A. I did not discuss the cocaine matter with him.

Q. Is the answer "Yes" or "No".

A. Repeat the question, please.

(The reporter read the question)

A. I cannot answer that "Yes" or "No". He just made a statement he did not want to discuss the cocaine. He mentioned the fact he wanted to discuss his personal travel, sir.

Q. (By Mr. Maley) From that point on, you then continued to interrogate him and question him in the general course of conversation about what his past history was, did you not?

A. I didn't interrogate him. We had conversation concerning his past, yes, sir.

Q. Wasn't the purpose of that conversation with Mr. McCann to elicit statements from him? That was the purpose of the conversation, wasn't it?

A. The purpose of the conversation was to find out what his background was, and what he had been doing for the past two years.

Q. So the purpose of the conversation was to find out all you could about Philip, isn't that true?

A. I wanted to find out what he had been doing for the past two years, yes, sir.

Q. At no time did you indicate to Mr. McCann while you were eliciting these things from him, you were going to come here and use it as evidence against him?

A. I already advised him what evidence we had on three previous occasions.

Q. And, after each of those occasions, he indicated he didn't want to talk about the cocaine, isn't that correct?

A. He only mentioned one time he didn't want to discuss the cocaine, so I didn't mention it any more.

Q. Then you proceeded to go into the general course of conversation about what his history was, and what his travels were, and so forth?

A. I asked him what he had done in the past, and I told him he could--I advised him if he wanted to, he didn't have to, and he did it voluntarily.

Q. So, some point after he said he didn't want to discuss the cocaine you were investigating, you went on from that point and continued to interrogate him, didn't you?

A. I had conversation with him, yes.

THE COURT. Anything further, Mr. Maley?

MR. MALEY. No, your Honor.

THE COURT. Mr Reed?

REDIRECT EXAMINATION

Q. (By Mr. Reed) Mr. Glazner, in what context did you mention the cocaine to Mr. McCann after you advised him of his rights?

A. I don't think I quite follow you.

Q. Did you, on that evening, indicate to Mr. McCann if he was not the owner, or possessor of that cocaine, he would be foolish to take the rap, so to speak, and you were willing to give him the time to think about it, and if he was delivering it for someone, he had an opportunity to cooperate?

A. Yes, sir, that was during my first conversation after I had advised him of his rights, after he told me he had been advised by Inspector Fuller and fully understood them. I informed him I didn't want him to make a statement, not one word. I wanted to talk with him a minute, and I advised him what evidence we had at this time, and I told him I felt with the evidence we had, after we finished our investigation,

the charges would probably be filed on him for importing cocaine, and if it was not his and he had nothing to do with it, other than delivering it to somebody, I felt it would be in his behalf to cooperate with us and deliver it to the intended receiver, and this would be brought to the attention of the United States Attorney, and he said he wanted to get his head together and time to think, and I said, "How much time do you want," and he said, "A day or so". I said, "We don't give a day or so, but you can have half and hour," and I left him for half an hour to get his head together, and I gave him a telephone book and told him I didn't want him to make a statement to me until he had an opportunity to consult an attorney, and I gave him the list of attorneys and told him to call one if he wanted to. Half an hour later I came back up, and we had our conversation.

Q. Is it true that you gave him a second opportunity to cooperate and he said he didn't want to?

A. Yes, I did.

Q. How long a time period does this cover, Mr. Glazner?

A. I'd say, approximately two hours, because while he was thinking of getting his head together, I went down with Special Agent George Bertram and we spoke to each passenger on the bus and reviewed all the evidence we had and made sure we hadn't missed any one, as far as talking to any one on the bus as passengers.

Q. Mr. Glazner, to the best of your knowledge, although you weren't there to watch him completely during that half hour, he wasn't moved at the behalf of you or any law enforcement officers during that time?

A. No. I took him from the general area which was downstairs where there was a lot of people. I thought it best to put him in a room by himself without everyone standing and looking, and I put him in a room upstairs by himself to make a phone call and get his head together, at his request.

RECROSS EXAMINATION

Q. (By Mr. Maley) Each time you asked Mr. McCann, or suggested to him that he cooperate with you, he, in fact, refused, didn't he?

A. He hung his head down, shook his head, and stated that he wanted to get his head together and have time to think about it.

Q. This was a continuous type of thing, you continued to ask him and suggest to him that he cooperate, didn't you? This took place over a long period of time?

A. No, sir, I asked him the first time to cooperate, and he said he would like to think about it and get his head together, and I gave him half an hour, and I went up to ask him if he had time to get his head together and wanted to discuss anything, and again he stated he still wanted more time to think about it. So, I left him and gave him approximately another half hour so we could complete the passengers on the bus so it could leave. So it took about three hours.

Q. So he still indicated he didn't want to cooperate when you came back again?

A. He indicated he didn't want to make statements concerning narcotics until he had a chance to get his head together some more.

Q. In other words, he wanted to stand on his constitutional rights to remain silent, didn't he?

A. He was advised---

Q. Is the answer to the question, "Yes" or "No"?

A. I cannot answer it "Yes" or "No". Reword it, please.

Q. The question was, he elected to stand on his constitutional rights, did he not?

MR. REED. Your Honor, counsel is calling for a conclusion. Obviously, Mr. Glazner can't make it; he can't look into Mr. McCann's mind. All he can do is judge him by his actions.

THE COURT. I don't know how he can answer that question, Mr. Maley. I will sustain the objection.

Q. (By Mr. Maley) Mr. McCann did not give you any indication he wanted to cooperate with you and assist you regarding the investigation of the cocaine, isn't that true, Mr. Glazner?

A. No, sir, it is not. If I may explain it, I will.

Q. I don't want your explanation.

A. No, sir, he did not.

Q. At some point he indicated to you he didn't want to talk about the cocaine?

A. The second time I went up, after he had his second period to think things over, he indicated at that time he indicated he did not want to discuss cocaine any further.

Q. Then you launched into this general conversation with him about his travels and so forth, isn't that true?

A. I had a conversation with him about his travels,

Q. You were still investigating the cocaine matter?

A. I was getting his background, what he did in the past two years, since he was not employed, and I was having a conversation with him, yes, sir.

Q. The reason for the conversation was to investigate the cocaine matter, was it not?

A. That had nothing to do with the cocaine, no sir.

Q. It had nothing to do with the cocaine?

A. Not his past travels for the past two years.

Q. It is your position that the Government wouldn't use those statements--

MR. REED. Object. He is not competent to answer that question, either.

THE COURT. Yes, I don't see how he can answer that, Mr. Maley.

Q. (By Mr. Maley) Mr. Glazner, the purpose of your conversing with Philip over this whole period of time was to obtain information from him, isn't that true?

A. What kind of information, sir?

Q. Any kind of information about his background.

A. I was trying to get information concerning his activities for the past two years, yes, sir.

Q. And, the reason you wanted that information was because you thought this would be helpful in your investigation, isn't that true?

A. Possibility it could have been, yes, sir.

Q. And, you sought to obtain that information after Mr. McCann indicated to you that he didn't want to cooperate with you and wanted to rest on his constitutional rights, isn't that correct?

A. Mr. McCann didn't have to make any statement to me, if he didn't want to, and he made these voluntarily after having been advised of his rights on two previous occasions, so I felt he had waived his rights when he discussed it with me, which he had the privilege to do.

Q. Did you indicate to Mr. McCann that you were, that any statement he might make with respect to his travels might be used against him?

A. He was told twice any statement he made could, and would be used against him. He was aware of that, he told me he was.

Q. After making that indication to him, you asked him about the cocaine, didn't you?

A. At what time?

Q. At the time after you advised him of his constitutional rights.

A. Immediately after advising him of his rights, there was no mention of the cocaine. I told him what evidence we had against him at this time.

Q. He made no admission to you it was his, isn't that true?

A. He made no admission whether it was his, or belonged to anybody else. He said nothing in that respect.

Q. In fact, he indicated to you he didn't want to talk to you about it?

A. At the second time, yes. The first time, he did not.

MR. MALEY. That is all we have, your Honor.

REDIRECT EXAMINATION

Q. (By Mr. Reed) One brief question. Part of your reason in asking some of these questions of Mr. McCann that evening after he had been advised of his rights and indicated a willingness to discuss his background, part of that reason was you wanted some information concerning factors relevant to a bail hearing, since you, at that time, had pretty much decided there would be such?

A. That is true. He had been paroled into my custody since he was not a citizen of the United States. He was my responsibility, and immigration put that responsibility on me to be sure he did show back up for trial and when the bond hearing would be, too.

THE COURT. Was that explained to Mr. McCann that he had been paroled under your custody, and you were endeavoring to obtain that information in connection with bail?

A. That portion wasn't. He was advised he was paroled into my custody and not legally admitted into the United States, only to appear with me for a bond hearing the following day.

THE COURT. I don't know what these statements are. Of course, I haven't heard them. It seems to me he made it abundantly clear he didn't want to discuss anything having to do with the cocaine, and it seems anything that might have to do with the cocaine matter--and again I haven't heard any evidence on that, so I don't know--he waived no rights as far as that is concerned, and as far as his background, I don't know how that ties into the instant offense. I think if he was told on two or three different

occasions of his rights and discussed his background, that would be proper, but I think it is improper as it might tie into the particular offense at the time at the border.

MR. REED. Your Honor, the proper evidence concerning his travels about the country will come in from real evidence seized on his person at the time. These discussions, we maintain that once a defendant is advised any statement he will make can be used against him, and he is aware of the identity of the person asking the questions is a Government agent, that any time he speaks thereafter, after a long time lapse, doesn't obtain a change of circumstances and continues a conversation, it would be a voluntary and intelligent waiver regardless of what he makes that statement for. There is no evidence here to date he was misled into anything he said. Mr. Glazner testified that any statement he made could be used against him.

Briefly, what the evidence would concern is the fact that when Mr. McCann was arrested, he had four, one hundred dollar bills on him, and as he was discussing his travels with him, while he was discussing these travels with Mr. Glazner, it came to

Mr. Glazner's attention Mr. McCann only earned some fourteen hundred dollars within the past two years, I believe.

It is not the Government's position, as a matter of law anyway, that a person can waive, can preclude a waiver by indicating that he doesn't want to talk about a specific thing, because I don't think--

THE COURT. Once he starts to talk about anything, if he says anything that amounts to a waiver, even though he made it quite clear he didn't want to talk about the cocaine?

MR. REED. Yes, your Honor. I believe once he was told anything he said may be used against him, he is on going notice that anything he does say could be used against him.

THE COURT. I disagree with that. I don't think somebody who is placed under arrest under circumstances, and if it is made quite clear he doesn't want to talk about a certain thing, I don't think that amounts to a waiver of his rights of whatever he may say. Is that your position?

MR. REED. No, your Honor. Our position would be he has a right to refuse to answer any question, and

any question he would respond to could be used against him, and Mr. Glazner never indicated Mr. McCann had any sort of immunity, so to speak.

THE COURT. All you intend to introduce, as I understand, about these statements is something having to do with the amount of money he earned over the past couple of years, is that right?

MR. REED. And, his travels which would come in by way of a passport seized at the time.

THE COURT. You don't need his statement if you have the passport.

MR. REED. It would elaborate, your Honor.

THE COURT. I will make the ruling that the statement of his earnings over the past two years were made voluntarily, and if he made some statement as to where he had been, I believe it was made voluntarily, but that would be the extent of it. You won't go any further.

MR. REED. Yes, your Honor. Thank you.

UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF VERMONT

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No. 74-2270

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UNITED STATES OF AMERICA

vs.

PHILIP J. McCANN

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COURT'S CHARGE TO THE JURY

THE COURT. Ladies and Gentlemen. I am going to appoint Mr. Sawyer as your foreman.

This case is a criminal prosecution brought by the United States against the defendant, Philip McCann. The grand jury indictment charges the defendant in two counts. Now originally, there were three counts, but the Government elected not to proceed on the third count, and accordingly,

I have entered it as dismissed. Thus, it is not for your consideration. The two remaining counts are as follows:

Count I charges that "On or about the 25th day of January, 1974, in the judicial district of Vermont, Philip McCann, the defendant, unlawfully, knowingly and wilfully did import into the United States from a place outside thereof, approximately 168 grams of cocaine, a Schedule II controlled substance, in violation of Sections 812, 952, 960(a)(1) and 960(b)(2), Title 21 United States Code."

Count II charges that "On or about the 25th day of January, 1974, in the judicial district of Vermont, Philip McCann, the defendant, unlawfully, knowingly and wilfully did possess with intent to distribute and dispense approximately 168 grams of cocaine, a Schedule II controlled substance in violation of Sections 841(a)(1) and 841(b)(1)(B), Title 21 United States Code."

Your verdict should not be influenced by the fact the defendant was indicted for this offense by the grand jury. An indictment is merely a formal procedural method of accusing a defendant of a crime preliminary to trial. An investigation by a grand jury is wholly one-sided in the Government's favor. The Government presents the grand jury all the evidence favorable to the Government in order to return an indictment, and the defendant has no opportunity to present evidence favorable to him. Therefore, the indictment is not

evidence of any kind against the defendant and does not create any presumption or permit any inference of the defendant's guilt.

The defendant has pleaded not guilty to the charges contained in the indictment. You have been chosen and sworn as jurors in this case to determine the issues of fact presented by the allegations of the indictment and the denial made by the "not guilty" plea of the defendant. You are to perform this duty without bias or prejudice as to any party.

You have observed that the defendant did not take the stand to testify in his own behalf. He has a constitutional right not to do so. One of the highest constitutional safeguards in our system of criminal justice is that a defendant is not obliged to testify or to produce evidence in his own behalf, and he may not be called as a witness by the prosecution or compelled to give evidence against himself. The exercise by a defendant of his right not to testify raises no presumption of guilt and permits no unfavorable inference of any kind to be drawn. In determining a defendant's guilty or innocence of a crime charged, you are not to consider, in any manner whatsoever, the failure of a defendant to testify as a witness or to produce evidence in his own behalf.

The law presumes a defendant to be innocent of a crime with which he is charged. This presumption of innocence continues throughout the trial down to the time in the

jury room, if that time does arrive, when you are satisfied from all the evidence, beyond a reasonable doubt, that any defendant is guilty of the crime charged.

The law permits nothing but legal evidence presented before this jury to be considered in support of the charge against the defendant. So, the presumption of innocence alone is sufficient to acquit the defendant, unless you are satisfied beyond a reasonable doubt of the guilt of the defendant from all of the evidence in the case.

You have seen and heard the evidence produced in this trial, and it is the sole province of the jury to determine the facts of this case, but first I would like to call to your attention certain guides by which you are to evaluate the evidence.

The burden of proof is on the Government to prove each element of the charges against the defendant beyond a reasonable doubt.

You cannot find the defendant guilty unless you determine that the Government has established by the evidence each and every essential element of the crime charged against him beyond a reasonable doubt. However, to support a

verdict of guilty you need not find every fact beyond a reasonable doubt. You need only find that the crime charged has been proven beyond a reasonable doubt from all of the evidence in the case.

A reasonable doubt is a fair doubt based upon reason and common sense and arising from the state of the evidence. By proof beyond a reasonable doubt you are not to understand that all doubt is to be excluded. It is rarely possible to prove anything to an absolute certainty. It must be a substantial doubt such as would make an honest and sensible and fair-minded person hesitate to act in a serious and important matter wherein ascertainment of the truth was conscientiously being sought.

A reasonable doubt may arise not only from the evidence produced, but also from a lack of evidence. The law never imposes upon a defendant in a criminal case the burden or duty of producing any evidence and, since the burden is always upon the Government to prove the accused guilty by proving beyond a reasonable doubt every essential element of the crime charged, the defendant has the right to rely upon a failure of the prosecution to establish such proof. A defendant may also rely upon evidence brought out on cross-examination of witnesses for the Government.

If, after impartial consideration of all the evidence you can candidly say that you are not satisfied of the

guilt of the defendant beyond a reasonable doubt, you should find the defendant not guilty.

There are two types of evidence which a jury may consider in determining whether or not a defendant is guilty as charged. One is direct evidence, such as the testimony of an eye witness. The other is circumstantial evidence, which consists of proof of a chain of circumstances from which a conclusion regarding essential facts in the case may be logically drawn. Regardless of the nature of the evidence, the law requires that before convicting a defendant, the jury must be satisfied of the defendant's guilt beyond a reasonable doubt from all of the evidence in the case.

Circumstantial evidence is legal and proper for you to consider and you may convict upon this class of evidence alone if, thereby, you are persuaded beyond a reasonable doubt of the defendant's guilt. But, the circumstances must be such as will lead the guarded discretion of a just and reasonable man to the conclusion that the crime charged has been committed and that the defendant is guilty of its commission.

Any testimony which has been excluded or which has been stricken from the record is not evidence in the case, and you will entirely disregard it in arriving at your verdict. Likewise, the arguments of the attorneys and any statements which they made in their arguments are not evidence and will

not be considered as such by you. You will render your verdict only from the evidence in the case which consists of the sworn testimony of the witness, the stipulations of counsel, and all exhibits which have been received in evidence. It is your recollection of the witnesses' testimony and not the attorneys' statements as to what that testimony was which shall control you in reaching your decision. But in your consideration of the evidence, you are not limited to the bald statements of the witnesses. On the contrary, you are permitted to draw, from facts which you find have been proved, such reasonable inferences as are justified in the light of your own experience.

If you feel that witnesses differed as to what the facts were, it is generally a safer way to reconcile the conflicting testimony, if you reasonably can, upon the theory that all of the witnesses intended to tell the truth. But if you cannot so reconcile the testimony, then you must determine, from all the evidence before you, which of the witnesses is entitled to greater credit.

The credibility of the witnesses and the weight to be given their testimony are questions entirely for your determination. The law is that you are not bound to give the same weight, the same credit, or have the same faith in the testimony of each witness, but you should give their testimony just such weight, just such credit, and have just such

faith in it that you think it is fairly entitled to receive. Consider the appearance of the witnesses on the stand; their candor or lack of candor; their feelings or bias, if any; their interest in the result of the trial and the reasonableness of the testimony they gave; and believe as much or as little of the testimony of each witness as you think you ought to.

A witness is presumed to speak the truth but if you reach the conclusion that any witness in the case has willfully or deliberately given false testimony about any material fact, you may reject from consideration all of his or her testimony, or you may accept such part as you may deem true and disregard that which you may feel is false.

Having in mind the general guidelines that I have just given you, it now becomes the duty of the Court to instruct you as to the law applicable to your determinations in this case.

It is your duty as jurors to follow the law as stated in these instructions and to apply the rules of law so given to the facts as you find them from the evidence. You will not be justified under your oath as jurymen in finding a verdict contrary to the law as the Court gives it to you.

It is the sole province of the jury to determine the facts in the case. The Court does not by any instructions given intend to persuade you as to how you should

decide any question of fact. It is your duty to decide all the facts from the evidence. All parties have a right to expect that you will carefully and impartially consider all the evidence in the case, follow the law as stated by the Court, and reach a just verdict.

Count I of the indictment charges a violation of 21 United States Code, Sections 952(a) and 960(a)(1).

Under Section 952(a) and Section 960(a)(1) it is unlawful to knowingly and intentionally import into the customs territory of the United States from any place outside thereof but within the United States or to import into the United States from any place outside thereof any controlled substance in Schedule 2 of 21 United States Code, Section 812. There has been evidence introduced that the substance involved in this case was cocaine. Cocaine is a controlled substance listed in Schedule II of the statute.

There are three essential elements to the offense charged in Count I of the indictment.

1. The act of importing a narcotic drug into the United States or the customs territory of the United States from any place outside thereof;

2. That the defendant knew that it was unlawful to import cocaine into the United States and with such knowledge intentionally imported the cocaine into the United States, and

3. That the drug imported was, in fact, cocaine. It has been stipulated and hence the evidence is undisputed that the substance was, in fact, cocaine.

The term customs territory of the United States contained in element one includes the States, the District of Columbia and Puerto Rico.

The word import as used in connection with this charge means simply to bring or cause to bring into the United States from a place outside thereof. However, even though a person may have possession of a narcotic controlled substance which is of a foreign origin, possession alone is not sufficient in and of itself to prove the essential element of importation. In other words, it requires more evidence established to your satisfaction than mere possession to prove the element of importation.

The second element that the Government must prove beyond a reasonable doubt is that the defendant acted knowingly and intentionally. An act is done knowingly if it is dom voluntarily and intentionally and not because of mistake or accident or some other innocent reason. An act is done intentionally if it is done knowingly, voluntarily and willfully and with the specific intent to do something which the law forbids. That is, with the purpose to either disobey or disregard the law.

Knowledge and willfullness of a defendant need

not be proved by direct evidence and, indeed, it seldom can be. However, like any other fact in issue, it can be established by circumstantial evidence. The acts of a person must be set in their time and place. The meaning and significance of a particular act or conduct may and usually does depend upon the circumstances surrounding the act or conduct. You should consider the acts and conduct of the defendant and whether such facts, if you believe them, make it likely or unlikely, probable or improbable that the defendant fully and precisely understood what he was doing.

If you are not convinced beyond a reasonable doubt that the defendant knew that the narcotic substance was not unlawfully imported, you must acquit the defendant on this charge.

The second count of this indictment charges the defendant with knowingly and intentionally possessing with intent to distribute approximately 5 ounces of cocaine in violation of 21 United States Code, Sections 841(a)(1) and 841(b)(1)(B).

21 United States Code, Section 841(a)(1) makes it unlawful for any person knowingly or intentionally to possess cocaine with intent to distribute.

There are four essential elements to the offense of knowingly or intentionally possessing cocaine with intent to distribute.

First, the defendant must knowingly and intentionally possess the cocaine. Possession as used in the statute can be either actual or constructive. Actual possession means that a person knowingly has manual or physical control or custody of the narcotic; that is, that they are in his personal possession. However, even if you find that a person charged with this offense did not actually possess the narcotic, this element of the offense is satisfied if you find beyond a reasonable doubt that the defendant had constructive possession of the controlled substance. A person has constructive possession of a controlled substance, such as cocaine, if he has the power to exercise dominion and control over the substance.

The second element of the offense is that the possession was knowing or intentional. In this regard, the instructions concerning the meaning of knowing and intentional acts which I gave to you earlier are applicable.

The third element of the offense is that the possession was with intent to distribute. This element requires that you find beyond a reasonable doubt that the possession was with intent to give, sell or otherwise transmit to others and not for one's own personal use.

In this regard, you may consider all the facts and circumstances surrounding the cocaine which was possessed as factors in determining whether the possession was with in-

tent to distribute. You may give these factors such weight as you believe they are entitled to receive. This assumes, of course, that you find the fact of possession beyond a reasonable doubt.

The fourth element of the offense is that the substance involved here was, in fact, cocaine, a Schedule II narcotic substance. As stated earlier the evidence is undisputed and it has been stipulated that the substance was cocaine. So you can consider this element has been satisfied.

There is another offense contained within the offense of possession with intent to distribute which you may consider even though it is not contained in the indictment. This is the offense of a knowing or intentional possession of a controlled substance. The statute involved here which is 21 United States Code, Section 844, provides that it is unlawful for any person knowingly or intentionally to possess a controlled substance. You will remember that cocaine is such a controlled substance.

There are two elements to this offense:

1. The defendant must be in possession of a controlled substance and

2. The possession must be knowing or intentional.

The same factors which I referred to earlier concerning possession apply here and the consideration bearing

on whether the possession was knowing or intentional are the same as previously referred to.

You need not find that the defendant knowingly or intentionally possessed a controlled narcotic substance with intent to distribute it in order to find him guilty of the offense of possession of a controlled substance. If you find the defendant not guilty of the offense of knowingly or intentionally possessing a controlled substance with intent to distribute it, you must then proceed to determine whether the defendant knowingly or intentionally possessed the narcotic. However, if you find the defendant guilty beyond a reasonable doubt of the offense charged in the indictment; that is, possession of a controlled substance with intent to distribute it, you need not consider the offense of knowing or intentional possession of a controlled substance. The Government must prove the elements of this offense beyond a reasonable doubt.

Before the defendant may be found guilty of a crime, the prosecution must establish beyond a reasonable doubt that under the statutes described in these instructions, the defendant was forbidden to do the acts charged in the indictment, and that he intentionally committed the acts, and that the acts were done voluntarily and intentionally, and not because of mistake or accident or other innocent reason.

As stated before, the law never imposes upon a defendant in a criminal case the burden or duty of calling

any witnesses or producing any evidence.

Again, I want to suggest to you that while the law is for the Court, and you are to apply the law as given you in these instructions, the findings of fact in this case are entirely for you.

Under your oath as jurors you cannot allow a consideration of the punishment which may be inflicted upon the defendant, if convicted, to influence your verdict in any way or in any sense enter into your deliberations.

The duty of imposing sentence rests exclusively upon the Court. Your function is to weigh the evidence in the case and to determine the guilt or innocence of the defendant solely upon the basis of such evidence and the law.

You are to decide the case upon the evidence, and the evidence alone, and you must not be influenced by any assumption, conjecture, or sympathy, or any inference not warranted by the facts until proven to your satisfaction.

The exhibits which have been admitted into evidence during the trial are for your consideration in your deliberations.

You must return a verdict of guilty or not guilty as to each count. Your verdict must be unanimous and will be delivered orally by your foreman in response to inquiries made by the Clerk.

(At the bench)

THE COURT. Government first.

MR. REED. Your Honor, we just have a comment concerning the statement that you have to know on the importation charge, you have to know it was against the law. Wouldn't it be more than just guilty knowledge? The way, at least I took it when stated, it would be he would have to know pretty much, as a fact, there was a specific law he would be violating.

THE COURT. Well, I don't think it refers to that. I think I will let it stand.

MR. REED. Mr. Gray, through me, would like to know if you can suggest how they could return a special verdict against Count 2?

THE COURT. That is something I intended to work out; probably have the clerk ask what the finding is, the verdict as far as Count 1 is concerned and Count 2, and if Count 2 turns out to be guilty, that is the end of it. If, not guilty, we'll have one more question, we'll ask, which will be that of the lesser included offense, of course.

THE COURT. Mr. Maley?

MR. MALEY. Your Honor, it is my understanding of the law that the respondent has the opportunity, prior to the charge, that the Court request of the respondent whether or not he wants a charge regarding his refusal to take the stand. In other words, give the respondent the opportunity

to indicate whether he wants that charged specifically to the Jury, or whether or not he wants no mention of it at all, and in this instance, we were not given that opportunity.

THE COURT. What is your authority for this?

MR. MALEY. I don't have a specific case in mind. It is my understanding that is the law now.

THE COURT. Mr. Gray, or Mr. Reed?

MR. REED. I saw even if that were to be the law, Mr. Maley had the opportunity in chambers to raise that issue.

THE COURT. What do you say to whether or not it is the law?

MR. REED. I can't speak to that, your Honor, if it wasn't within the discretion of the Court to give.

THE COURT. If you are right, Mr. Maley, somebody will establish that fact for you. Anything else?

MR. MALEY. No, your Honor.

(End of exceptions at the bench)

THE COURT. Will the Marshals come forward and be sworn.

(Marshal Hansen and Deputy Marshals Barber and MacDonald were duly sworn by Deputy Clerk Atherton.)

THE COURT. At this time, Mrs. Belanger, we'll excuse you and thank you for your assistance as far as this case is concerned, but the remaining jurors look hale and

hearty, and I think they will get through their deliberations.

(Mrs. Belanger left the courtroom)

THE COURT. You may now take the case, Ladies and Gentlemen, and we'll stand in recess.

(The Jury retired at 12:50 p.m.)

(In chambers)

THE COURT. In this case the Jury has requested a copy of the indictment be sent to them in the jury room, and it is the Court's practice to indulge such a request. In this case, I would propose to send just Counts 1 and 2, since, obviously, Count 3 has been dismissed. Does the Government have objection to this procedure?

MR. REED. No, your Honor.

THE COURT. Does the defendant have objection to this procedure?

MR. MALEY. Yes, we object, your Honor. I think it would tend to confuse the Jury if they did not have something in there with respect to the lesser included offense, since that has been charged. If they simply have the two counts, it might take that out of their mind.

THE COURT. I don't think so; I disagree. I think they are entitled to have a copy of the indictment. So, we will note your objection and overrule it and send the copy of the first two counts.

(End of discussion on indictment)

(In chambers)

THE COURT. I see we have some counsel for the case in which the Jury is deliberating, and I have, for their benefit, an inquiry from the Jury with reference to Count 2 which says, "5.5 ounces of cocaine, what is its worth in American dollars. Two: How long would it take a normal person to use this amount of cocaine," neither of which the answers to those questions were not covered in the evidence, and I think I would have to so adivse the Jury.

MR. MALEY. That would be our position, your Honor.

MR. GRAY. Regretfully, I concur.

THE COURT. Well, I guess I will ask the Marshal to bring the Jury in, and we'll have to suspend with this hearing for a minute. Get Mr. Reed, Mr. Gray.

MR. GRAY. Yes, your Honor.

(In the courtroom)

THE COURT. All right, Mr. Marshal.

(The Jury entered the courtroom at 2:10 p.m.)

MR. REED. May we approach the bench?

THE COURT. Yes.

(At the bench)

MR. REED. Your Honor, I will go on what Mr. Gray told me concerning the note. I was curious. I believe you are going to instruct that hasn't been specifically put

in evidence, or would you further instruct they can draw inferences? In other words, would you repeat---

THE COURT. No, I will not. I will tell them if it was not in evidence, I wanted it out. I thought this was a deficiency in connection with the requests to charge, but no, I will just tell them.

(End of bench discussion)

THE COURT. Mr. Foreman, I have a note which reads as follows: "Count 2: 5.5 ounces of cocaine: One, what is its worth in American dollars? Two, how long would it take a normal person to use this amount of cocaine?"

There is no evidence in this case as to the worth in American dollars, and there is no evidence in the case as to the period of time it would take a normal person to use this amount of cocaine, and you can only use the evidence in the case on which to base your determination, so that it is impossible for me to advise you, or specifically answer those questions. You will have to make your determination based on the evidence in the case, all of the evidence in the case, as you consider it to be. I just can't answer the question.

MR. FOREMAN. Yes, sir.

THE COURT. So if you will return to your deliberations please.

(The Jury retired at 2:12 p.m.)

Certificate of Service

Nov 25, 1974

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Eastern District of New York.

William Cyrte